Supreme Court, U.S.
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No. 96-934

In The

Supreme Court of the United States

October Term, 1996

FANNY M. RILEY, as Administratrix of the Estate of Ralph E. Lowe, deceased, et al.,

Petitioners,

v.

PATRICK NEWTON, individually and in his official capacity as a de facto officer with the Richmond County, Georgia, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Statement of Facts

Due to the proliferation of narcotic use and activity among military personnel, the Ft. Gordon, Georgia military police formed a Drug Suppression Team.[1] The function of the Drug Suppression Team was to investigate drug use and trafficking involving military personnel. Toward this objective, they reached an informal agreement with the Richmond County Sheriff's Department to participate jointly in drug investigations off base where there was evidence that the illegal narcotics activities involved military personnel.

Patrick Newton and David Padron were military police officers who were members of the Ft. Gordon Drug Suppression Team. David Padron was superior in rank to Patrick Newton and was in charge of the Drug Suppression Team members whenever Dave Cagle, another Drug Suppression Team member, was not present. (R-3-72-2; Glisson deposition at page 18) The defendant Kenny Glisson was a narcotics investigator with the Richmond County Sheriff's Department and at times worked jointly with the Ft. Gordon Drug Suppression Team. (R-3-72-2) Glisson was aware that the Drug Suppression Team members were only authorized by the Department of the Army to assist in drug investigations off base where there was some military connection, i.e. military personnel possessing drugs, purchasing drugs, or individuals who were selling to military personnel. (R-3-72-2; Glisson

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[1] Ft. Gordon is a military installation located contiguous with Augusta, Richmond County, Georgia.

deposition at pages 19, 20) He was also aware that they did not have the authority to go into the civilian community and conduct investigations or arrest individuals without the local law enforcement agency. (Glisson deposition at pages 19-20) The Barton Village area of Augusta was one of the areas where it was known that military personnel purchased narcotics from street corner drug dealers and therefore it was one of the places that the Drug Suppression Team worked jointly with the Sheriff's Department investigating and arresting the street corner drug dealers. (R-3-72-4, 5) Toward this objective, Patrick Newton, a military police officer, who at one time was attached to the Drug Suppression Team, participated in undercover buys of narcotics from street corner drug dealers in Barton Village. (Glisson deposition at page 56) However, Newton never made buys in conjunction with the Sheriff's Department unless there was some type of military connection. (Glisson deposition at page 56) Barton Village is one of the most dangerous areas in Augusta due to the extensive drug trafficking and violent criminal activity in that area. (R-3-72-4; Glisson deposition at page 21; Strength deposition at page 47)

The entire time that Glisson worked with the Drug Suppression Team, he never witnessed any act of excessive force by Patrick Newton or any other member of the Drug Suppression Team. He had never seen them conduct themselves in any way other than as well trained professional law enforcement officers. He had no knowledge of any prior instances of alleged excessive force involving Patrick Newton or any other member of the Drug Suppression Team. He assumed that the officers from Ft. Gordon were well trained in all aspects of police work

including the proper use of force, just as he would assume the same for an officer from any other law enforcement agency. There was never any prior incident that would have put Glisson or any other defendant on notice that any of the officers from Ft. Gordon, including Patrick Newton, were anything but well trained. (R-3-72-6, 7, 8; Glisson deposition at pages 44-47, 123)

At some point prior to September 2, 1989, Glisson had heard rumors that Patrick Newton had allegedly failed a urine test at Ft. Gordon. Later, he heard that Newton had been completely cleared concerning the urine test because his failure of the test was attributed to his handling cocaine during his undercover operation with the Drug Suppression Team. In any event, Newton only quit working for the Drug Suppression Team for approximately two weeks and then continued his activities. He continued to show up at joint operations with the other members of the Ft. Gordon Drug Suppression Team. Neither Glisson nor any member of the Richmond County Sheriff's Department was ever informed directly by anybody at Ft. Gordon that Newton was not a member of the Drug Suppression Team or that he was not authorized to work in the joint operations. (R-3-72-2, 3)

On the evening of September 2, 1989, Glisson received a phone call from David Padron of the Drug Suppression Team. Padron wanted to ride with Glisson and check out some of the local hangouts of the military personnel. Padron told Glisson that his brother was with him and asked if it was all right if he rode along with them. Glisson indicated it was fine as long as his brother remained in the vehicle, did not carry a weapon, and that his brother would be Padron's responsibility. (R-3-72-3)

When Glisson met Padron and his brother that night at the Southgate Plaza at the Southgate Substation of the Sheriff's Department, Patrick Newton was there also. (R-3-72-3) Newton was going to point out individuals that were involved in the sale and use of drugs involving the military that Newton had become familiar with during his undercover duties with the Drug Suppression Team. The four of them went in Glisson's vehicle. (R-3-72-3, 4; Glisson deposition at page 51)

Glisson, however, was contacted by dispatch and requested to go to the Barton Village area of Augusta and respond to a complaint of a loud party. As previously stated, Barton Village is a predominantly black neighborhood which is a high crime area with a great deal of illegal narcotic activities and violent crime. The Ft. Gordon officers accompanied Glisson on the call because of the possibility of military personnel being involved. (R-5-83-7)

Glisson responded to the complaint concerning a loud party and spoke to the person throwing the party. The complaint was resolved without any trouble. As they were leaving the party, it was approximately 10:30 or 11:00 p.m. They then observed a white male in a pickup truck driving through Barton Village. The pickup truck pulled up to a corner and stopped and the driver began conversing with a black male in the corner. After speaking for a few seconds, the black male got into the vehicle with the white male. Glisson, as well as Newton and Padron, immediately recognized this incident as a street corner drug deal. It was a classic scenario which the officers had seen numerous times previously. A white

male driving through a predominantly black neighborhood late at night and approaching a black male on the street corner was a classic modus operandi of a street corner drug deal which the Drug Suppression Team had investigated many times in the past, specifically in this same neighborhood. (R-3-72-4, 5)

Glisson decided to pull the vehicle over as an investigatory stop. He planned on asking the occupants for identification, perhaps patting them down for weapons, and asking them what they were doing. If no further evidence of criminal activity was observed, Glisson would have let the vehicle go on its own way. (R-3-72-5)

Glisson turned on his blue lights and the truck pulled over to the corner. After Glisson and the others got out of their car, the truck immediately sped away. Glisson jumped back into his vehicle and gave chase. Newton was the only other of four who got back in the car prior to Glisson giving chase. After a short distance, Glisson was able to pull his vehicle in front of the truck forcing it to a stop. (R-3-72-5)

Obviously concerned for his safety, Glisson pulled his service revolver and approached the driver's side of the vehicle. He repeatedly instructed the driver to turn off the ignition of the truck and to put his hands where Glisson could see them. The driver of the truck did neither. Glisson then opened the door of the truck, reached in and pulled the driver out and placed him on the ground. By the time he had gotten the driver of the vehicle, later identified at Stephen Green, on the ground, David Padron ran up and handed him some handcuffs. Glisson placed the handcuffs on Mr. Green. (R-3-72-5, 6)

Glisson then quickly headed toward his car to turn off the siren. This was the first time he could see Newton and the passenger. He noted that Newton had the passenger down on the ground and was straddling him while attempting to place handcuffs on the suspect. At this point, Glisson heard a shot. As he approached Newton and the suspect he heard the suspect say "you shot me" and then Newton said to Glisson "he hit my gun and it went off". The passenger, Ralph Lowe, had one hand handcuffed and the other was free. Glisson then went to his car, called for an ambulance, and for Maj. Ronnie Strength of the Sheriff's Department. (R-3-72-6)

The subsequent search of the truck that Mr. Green and Mr. Lowe were in revealed the presence of five marijuana cigarettes, two smoking devices with residue, and a pack of rolling papers. No cocaine was found. (R-3-73-6) However, Mr. Green, upon being interviewed by the Georgia Bureau of Investigation that night, indicated that he was attempting to purchase cocaine from Mr. Lowe and Mr. Lowe told him he would take him to where he could get some. (R-3-73-3)

Patrick Newton was also interviewed by the GBI that night. When asked why he was with Mr. Glisson that night, Newton replied that he was there pursuant to an agreement between Ft. Gordon and the Richmond County Sheriff's Department for joint drug investigations. (R-3-73-2)

The officers did not go to Barton Village specifically to make any drug arrests but were side-tracked by the loud party call. If they had not run across the obvious drug transaction, they would have done routine patrols

looking for military involvement in known drug areas. (R-3-72-8)

There is absolutely no written documentation from Ft. Gordon that Patrick Newton was assigned to the Drug Suppression Team or was ever removed from the Drug Suppression Team. (R-3-74) Apparently, contrary to ordinary Army procedure, all assignments to the Drug Suppression Team were informal and verbal. (R-5-83, 5) There is no written documentation from Ft. Gordon informing the Sheriff's Department that Patrick Newton was not authorized to participate in the joint operations of the Drug Suppression Team. (R-3-74) David Padron, who was Newton's superior, did not indicate to Kenny Glisson on the night of September 2, 1989, in any way that Patrick Newton was not authorized by the Army to participate in joint activities of the Drug Suppression Team or was otherwise not authorized by the Army to be present that night. Neither did David Padron voice any objection to the choice of weapons of Patrick Newton. (R-3-72-7; Glisson deposition at pages 112, 113)

Mischaracterization of Facts In Petitioners' Petition

On page 5 of the petitioners' petition, petitioners state that Glisson did not throw the white driver onto the ground when he removed him from the car. However it is undisputed that Glisson forcibly removed the driver from the car and forcibly placed him on the ground where he was handcuffed. (R-3-72-5, 6)

Contrary to contentions of the petitioners in their petition before this Court, there is no evidence whatsoever that Patrick Newton participated in any joint operation with the Richmond County Sheriff's Department that did not have some involvement with military personnel. The focus of the Drug Suppression Team was to either investigate and arrest military persons possessing drugs or those individuals who were selling drugs to the military. The street corner drug activity that Patrick Newton participated in with the Richmond County Sheriff's Department, specifically in the Barton Village area, was undertaken because it was an area where military personnel purchased drugs from civilian personnel. In fact, when Dave Padron contacted Glisson on the night of September 2, 1989, he indicated that one of his objectives of that night was to look on the street corners for drug dealers selling to military personnel. (Glisson deposition at page 42)

Contrary to contentions of the petitioners in their petition before this Court, there is no evidence that would justify any conclusion that the Drug Suppression Team from Ft. Gordon was used for general civilian law enforcement purposes. Glisson testified in no uncertain terms that everything the Drug Suppression Team did, including Patrick Newton, had some type of military connection. (Glisson deposition at pages 20, 25, 26, 56, and 109) The only limitation that he was unaware of was where the Drug Suppression Team members could be utilized. After all, according to Glisson, military drug involvement can have many locations around the city of Augusta. (Glisson deposition at page 109) There is no testimony that Mr. Newton or other members of the Drug

Suppression Team were ever used for anything other than drug investigations that Glisson and the Drug Suppression Team members from Ft. Gordon thought might have some military connection.

On page 11 of the petitioners' petition, the petitioners theorize that a reasonable jury could find that Glisson caused the alleged deprivation by failing to act because he had a prior knowledge of how Newton acted and that he had an opportunity to supervise but did not. (Petitioner's petition at page 11) However, as noted above, there is absolutely no evidence in the record of any kind whatsoever that Newton had ever acted improperly at any time prior to September 2, 1989. There is no evidence of any kind that Newton had ever committed any civil rights violation, had ever committed excessive force, or had ever been accused of any such improprieties.

REASONS FOR DENYING THE WRIT

I. Posse Comitatus Act

The petitioners submit that this Court should grant the writ on the issue of the Posse Comitatus Act for two reasons. Initially, the petitioners submit that the writ should be granted to elaborate on the meaning of the Act. (Petitioner's petition at page 15) Secondly, the petitioners submit that there is a split in the circuits with regard to the test for determining a violation of the Posse Comitatus Act. The petitioners' contentions in this regard are without merit.

The petitioners' contention that there is a split among the Eighth Circuit and the Eleventh Circuit as to the test used to determine a violation of the Posse Comitatus Act is misplaced. While the District Court in *United States v. McArthur*, 419 F.Supp. 186 (D.N.D.), *aff'd sub nom, United States v. Casper*, 541 F.2d 1275 (8th Cir. 1976), *cert. denied*, 430 U.S. 970, 97 S.Ct. 1654, 52 L.Ed.2d 362 (1977), did espouse three tests for determining whether a violation of the Act has occurred, the Eleventh Circuit Court of Appeals has not held contrary to said decision.

The two Eleventh Circuit cases on this subject prior to the Eleventh Circuit decision in the instant case were *United States v. Hartley*, 678 F.2d 961 (11th Cir. 1982); and *United States v. Bacon*, 851 F.2d 1312 (11th Cir. 1988). In *Hartley* the Eleventh Circuit Court of Appeals applied all three tests from the Eighth Circuit and found that no violation of the Act occurred. See *Hartley* at page 978. In *United States v. Bacon*, the Eleventh Circuit Court of Appeals in a per curiam opinion also found no violation of the Act and cited *Hartley* in support of its holding. Although it is not clear, it also appears the Eleventh Circuit in *United States v. Bacon* applied all three tests. In the case at hand, the Eleventh Circuit Court of Appeals reiterated that in both *Hartley* and *Bacon*, all three tests emanating from the Eighth Circuit were applied. (See App. 10 of petitioner's petition) Therefore, there is no split among the Circuits as to the standard to be applied in determining a violation of Posse Comitatus Statute.

In any event, the petitioners are confused as to the basis of the Eleventh Circuit's ruling on the Posse Comitatus Act. The Eleventh Circuit Court of Appeals did not necessarily rule that there was absolutely no violation of Posse Comitatus Act under the facts and circumstances of

this case, rather the Eleventh Circuit ruled that the law in that regard was not clearly established such that Glisson would have known that his actions and conduct violated the Posse Comitatus Act and consequently would result in a deprivation of the constitutional rights of the petitioners' decedent. (Petition for writ of certiorari, App. 11)

II. Qualified Immunity for Alleged Violations of the Posse Comitatus Act

The Eleventh Circuit Court of Appeals in affirming summary judgment to Glisson and Sheriff Webster held that both were entitled to the defense of qualified immunity because the law concerning posse comitatus was not so well established that Glisson and Webster should have known that their actions violated clearly established statutory or constitutional rights of which a reasonable person would have known. (See petitioners' petition for writ of certiorari, App. 8, 12) The petitioners request that this Honorable Court review said rulings. As best the respondents can determine, the petitioners apparently contend that since a statute is involved, then the law is clearly established such that qualified immunity is not available as a defense. However, the petitioners' contentions in this regard are misplaced and this case does not meet the requirements for the granting of certiorari.

In *Davis v. Scherer*, 468 U.S. 183, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984), this Honorable Court held that defendants sued for constitutional violations do not lose their defense of qualified immunity because their conduct violates a statute. Explaining this holding, this Court stated that officials sued only lose their immunity if they are

sued directly for a violation of the particular statute. See *Davis* at 104 S.Ct. 3019 n.12 In this case the plaintiffs are suing the defendants for violation of their constitutional rights pursuant to 42 U.S.C. §1983 not for a violation of the Posse Comitatus Act. The issue in this case which was resolved by the Eleventh Circuit Court of Appeals was whether there was a violation of a Posse Comitatus Act and whether it was clearly established that such a violation under the circumstances in this case was a violation of a clearly established constitutional right of the plaintiffs. Therefore whether the defendants violated the Posse Comitatus Act does not necessarily answer the question of the availability of the defense of qualified immunity.

It is respectfully submitted that the decision of the Eleventh Circuit Court of Appeals affirming summary judgment to Glisson and Webster in his individual capacity on the basis of qualified immunity was eminently correct and fully supported by law. The case law concerning what constitutes a violation of the Posse Comitatus Act and whether such a violation results in a deprivation of constitutional rights is very limited in nature. In fact, as previously pointed out, there were two prior Eleventh Circuit decisions making it appear that the defendants' actions in this case did not violate the statute. See *Bacon, supra,* and *Hartley, supra.*

With regard to the petitioners' contentions that the Eleventh Circuit case law looking only to its own decisions and those of this Honorable Court for determining clearly established law in a qualified immunity context, the Eleventh Circuit opinion in this case removed any such issue as a legitimate basis for certiorari. The Eleventh Circuit did in fact look at case law from other

circuits and determined that there was no help for the petitioners in the case law of other circuits as well. (See petitioners' petition for writ of certiorari, App. 9, n.1)

The petitioners have failed to cite one single case of any factual situation where a local law enforcement officer was found to have violated the constitutional rights of an individual due to an alleged violation of the Posse Comitatus Act. Therefore, Glisson and Webster "could have reasonably believed" that their actions were lawful and both were entitled to qualified immunity in this regard.[2]

III. The Investigatory Stops of the Vehicle

The petitioners' petition also complains of the Eleventh Circuit's decision concerning the lawfulness of the investigatory stop of the vehicle in which the petitioners' decedent was a passenger. The District Court granted summary judgment on this issue finding that both stops of the vehicle were legal and proper. (See petitioners' petition for writ of certiorari, App. 39, 42-43) The Eleventh Circuit Court of Appeals found that the issue regarding the legality of the stops of the vehicle was not relevant to Glisson's liability for the military police

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[2] One reason for the lack of case law in this area is because local law enforcement agencies have no authority over the military and therefore cannot "use" them within the meaning of the statute. This is also evidenced by the congressional record quoted by the petitioners in their petition to this Court in which it was stated that the statute was to apply to the "Commander in Chief down to the lowest officer in the Army . . . ". (See petition for writ of certiorari, p. 14)

officer's actions. (See petitioners' petition for writ of certiorari, App. 7) Therefore the petitioners lost this issue in both the District Court and in the Eleventh Circuit Court of Appeals. There is absolutely no reason for this issue to be reviewed again by this Court.

The petitioners begin their argument on this issue by contending that their decedent became the target of a governmental stop and a full blown arrest because he was a young black male, in a black neighborhood where drugs were sold and he had been approached by a white driver who had no business in that neighborhood at that time of night. (Petitioners' petition for writ of certiorari at pages 20-21) However the truth of the situation is that the plaintiffs' decedent became the target of a governmental stop because he was involved in the sale of drugs on a street corner, attempted to elude the police when the vehicle he was travelling in was lawfully pulled over, refused the officer's commands to raise his hands and exit the vehicle, and physically resisted the military police officer's efforts to secure him for the safety of the officers and bystanders.

The petitioners seem greatly disturbed by the fact that race was one factor in the calculation of reasonable articuable suspicion and that none of the actions observed by the officers were in and of themselves criminal.

However this Court has previously held that the relevant inquiry is not whether particular conduct is innocent or guilty, but the degree of suspicion that attaches to particular types of non-criminal acts. See *United States v. Sokolow*, 490 U.S. 1, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989) Furthermore, numerous case law has

indicated that while reasonable suspicion cannot be based solely on race, race can be a factor in determining reasonable suspicion. See *United States v. Fouche*, 776 F.2d 1398 (9th Cir. 1985); *United States v. Franco-Munoz*, 952 F.2d 1055 (9th Cir. 1991); *United States v. Anderson*, 923 F.2d 450 (6th Cir. 1991)

The fact that plaintiffs' counsel is apparently disturbed because the race of the two individuals played a part in the officers calculation of reasonable suspicion doesn't make it any less a truism. This was pointed out by the District Court in its summary judgment order by citing the following holding from *United States v. Weaver*, 966 F.2d 391 (8th Cir. 1992), *cert. denied, Weaver v. United States*, 113 S.Ct. 829 (1992), in which the Eighth Circuit observed:

> We would not hesitate to hold that a solely race-based suspicion of drug courier status would not pass constitutional muster. Accordingly, had [officer] Hicks relied solely upon the fact of [defendant] Weaver's race as a basis for his suspicions, we would have a different case before us. As it is, however, facts are not to be ignored simply because they may be unpleasant – and the unpleasant fact in this case is that Hicks had knowledge, based upon his own experience upon the intelligence reports he had received . . . that young male members of black Los Angeles gangs were flooding the Kansas City area with cocaine. To that extent, then, race when coupled with the other factors Hicks relied upon, was a factor in the decision to approach and ultimately detain Weaver. We wish that it was otherwise but we take the facts as they are presented to us, not as we would like

them to be. *Weaver* at 395 n.2 (See petitioners' petition for writ of certiorari, App. 37, n.19)

As pointed out by the District Court, the petitioners' arguments ignore the other evidence besides the race of the participants that went into the calculus of determining reasonable suspicion by the officers; the time of day, the manner of the truck's approach to the street corner, the quick entry into the truck, and the commonality of the street corner drug transactions in that area. (See petitioners' petition for writ of certiorari, App. 37-38)

The petitioners attempt to equate this case to the cases in which an innocent passenger is ordered to exit a vehicle during a traffic stop. However this case is completely different from such situations where during a routine traffic stop in which the driver has committed a traffic violation, the passenger is also requested to exit his vehicle and detained and searched. In this case, there was an actual and obvious drug transaction taking place and when confronted by police officers, the offenders fled creating a legitimate expectation of danger and the necessity for further action which more than justified the officers' subsequent stop, the drawing of their firearms, and the handcuffing of the suspects for everyone's safety.

In the District Court, the defendants argued that they were entitled to summary judgment on this issue on the merits as well as on the basis of qualified immunity. The qualified immunity argument was not reached by either the District Court or the Eleventh Circuit Court of Appeals. Obviously, if both lower Courts felt the basis of the vehicle stop was not a ground for liability, Glisson could have reasonably believed the stop was legal such

that he was also entitled to qualified immunity on this issue. It is therefore respectfully submitted that there is no basis for certiorari on this issue as well.

IV. Municipal Liability

Lastly, the petitioners request that this Court grant a writ of certiorari on municipal liability against Sheriff Webster in his official capacity and Richmond County, Georgia. The respondents submit that there is no basis to grant certiorari on this issue as this is simply not a training case, at least not as it relates to the county defendants.

Several considerations in this regard must be highlighted. It is important to remember that there is no evidence that Patrick Newton was being used regularly to enforce purely civilian matters. Glisson testified (and there is no evidence to the contrary) that he was aware that the Drug Suppression Team from Ft. Gordon could only be involved where there was a military connection. He further testified that Newton was never involved in anything which there was not a palable military connection. The only aspect that he indicated that he was not aware of as to the limitations of the Ft. Gordon Drug Suppression Team was as to where they could operate in conjunction with the Sheriff's Department. Because as he said, the military drug involvement could exist anywhere off base.

Furthermore, there was absolutely no evidence of any kind that there had been any prior problems, any

prior complaints, or any prior alleged constitutional violations committed by the joint operations of the Richmond County Sheriff's Department and the Drug Suppression Team from Ft. Gordon. For a policy maker to be liable for a custom, policy, or procedure, they "must have had actual or constructive notice that the particular omission is substantially certain to result in a violation of constitutional rights of their citizens." *Young v. City of Augusta, Georgia*, 59 F.3d 1160, 1172 (11th Cir. 1995) citing *City of Canton, Ohio*, 489 U.S. at 396, 109 S.Ct. at 1208 (O'Conner, J., concurring in part and dissenting in part). See also *Belcher v. City of Foley, Alabama*, 30 F.3d 1390, 1397-98 (11th Cir. 1994) (the need for more or better training must be obvious or a pattern of constitutional violations must exist such that the municipality knows or should know that corrected measures are needed).

The officers from Ft. Gordon which made up the Drug Suppression Team, including Patrick Newton, had specific authority from the Department of Army to operate off base in cooperation with local law enforcement agencies to investigate those selling drugs to military personnel and possession of drugs by military personnel. These types of arrangements had been approved by the Eleventh Circuit Court of Appeals. See *Bacon, supra* and *Hartley, supra*.

The fact that Newton chose to carry his personal weapon that he may not have been authorized to carry can only translate into liability to the U.S. or to his superior Dave Padron, but certainly not to the Sheriff of Richmond County who had no actual authority over Mr.

Newton.[3] After all, it is undisputed that neither Glisson, Richmond County, nor any other law enforcement officer with the Sheriff's Department had knowledge that Patrick Newton was not authorized to carry or was untrained with the use of the particular weapon he carried that night. Further, there is not the first iota, scintilla or even suggestion of any evidence that the officers from Ft. Gordon, including Patrick Newton, were anything but well trained professional police officers. There is not the first bit of evidence that any of those officers, including Newton, had ever done anything improper or ever conducted themselves other than as professional police officers such that Sheriff Webster or Richmond County were put on notice that there was a need to train his officers further or to train or supervise the Ft. Gordon officers. As previously stated, there is no evidence that the Drug Suppression Team was used for anything other than for a situation where there was some type of palable military connection either through drug dealers selling to military personnel or military personnel possessing drugs. However, assume for the purpose of argument that there was evidence that the Drug Suppression Team, including Newton, overstepped their authority and participated in drug arrests with absolutely no possible military connection prior to this incident. It still does not follow that this would be a basis for liability against these defendants, in the absence of some evidence that the members of the Drug Suppression Team, including Newton, were untrained, incompetent, or had committed constitutional

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[3] This is clearly recognized by the United States as they chose to settle all claims with plaintiffs. (R-3-75)

violations in the past and that these defendants were aware of same.

It therefore begs the question of exactly what the defendant Sheriff and County did wrong. The Sheriff's Department only responded to the request of the United States Army to assist them in their effort to curb the use of narcotics by military personnel and the sale of narcotics to military personnel.[4] As this Honorable Court noted in *City of Canton, Ohio v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989) there are very limited circumstances in which an allegation of a "failure to train" can be the basis for liability under §1983. *Harris* at page 1204. In *Harris*, this Court stated that "only where failure to train reflects a 'deliberate or conscious' choice by a municipality can a city be held liable for such a failure under §1983". *Harris* at page 1205. The warning issued by this Court in *City of Canton v. Harris* is never more appropriate than it is in this case:

> In virtually every instance where a person has had his or her constitutional rights violated by a city employee, a §1983 plaintiff will be able to point to something the city "could have done" to prevent the unfortunate incident. [cite omitted] Thus, permitting cases against cities for

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[4] It should be noted that law enforcement agencies from different jurisdictions from all over the country have entered into cooperative agreements to participate in joint investigations involving narcotic activities. Since drug traffickers do not operate within any one jurisdiction, certainly this is a reasonable response to a widely known problem in our society. Any suggestions that such cooperative agreements are somehow unconstitutional or somehow result in civil rights liability to the cooperating agencies is simply frivolous.

> their "failure to train" employees to go forward under §1983 on a lesser standard of fault would result in defacto respondeat superior liability on municipalities – a result we rejected in *Monell. City of Canton, Ohio v. Harris,* at page 1206.

That is exactly what is occurring in this case. There is no evidence in the record to suggest that if Mr. Newton had been carrying a different type of weapon, the results would have been any different. After all, the type of weapon Mr. Newton carried that night is not the only weapon that can discharge accidentally during a struggle with a suspect. Furthermore, there is absolutely no case law cited by the District Court or by the petitioners that would suggest that the Sheriff's Department had a responsibility under the Constitution to approve the type of weapon that an officer from a different agency carried. Likewise, there is no evidence in this case that would justify the conclusion that if Glisson had more instruction on the permissible use of the military (although there was no violation of the Posse Comitatus Act in this case), anything would have occurred any differently. Certainly Glisson still would not have ignored an obvious drug transaction and it would have been completely irresponsible for Newton to allow Glisson to deal with the two occupants in the car under these circumstances, in that neighborhood, at that time of night, all by himself.

It is just as logical to argue that as a matter of law these defendants are entitled to summary judgment because if Mr. Green had not gone to the Barton Village area that night to purchase cocaine, or if Mr. Lowe had not been attempting to sell him cocaine, or if they had not tried to flee in the truck after the initial stop, or if Mr.

Lowe had not resisted Mr. Newton's efforts to handcuff him, he would not have been shot. All of these actions may have resulted in Mr. Lowe not being shot if they had not taken place.

Similarly, if Glisson had ignored the obvious drug transaction, or if Newton had allowed Glisson to deal with the situation himself, Mr. Lowe may not have been shot. However the fact that these events did take place does not render the Sheriff or Richmond County liable for what occurred that night under the decisions of this Honorable Court in *Monell*[5] and *City of Canton, Ohio v. Harris, supra.*

For these reasons, the respondents respectfully submit to the Court that there is no basis for the granting of petitioners' writ of certiorari on the issue of the municipal liability of Sheriff Webster in his official capacity and Richmond County, Georgia.

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[5] *Monell v. Department of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)

CONCLUSION

For the reasons stated above, the respondents respectfully request that this Honorable Court deny the petition for the writ of certiorari.

Respectfully submitted,

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